Office - Supreme Court, U.S.
FILED
SEP 1 1982
ALEXANDER L. STEVAS,
CLERK

NOS. 82-203, 82-5159

IN THE SUPREME COURT
OF THE UNITED STATES

NO. 82-203

MARK S. SAVOY
and
ROBERT J. TARR,
Petitioners

V.

COMMONWEALTH OF MASSACHUSETTS
Respondent

NO. 82-5159

ALEXANDER ALDOUPOLIS,
Petitioner

V.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

BRIEF FOR RESPONDENT, COMMONWEALTH OF MASSACHUSETTS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

FRANCIS X. BELLOTTI
Attorney General

BARBARA A. H. SMITH
Assistant Attorney General
Chief, Criminal Appellate
Division
(617) 727-2240

TABLE OF CONTENTS

OPINIONS BELOW.....1

JURISDICTION.....2

STATEMENT OF THE CASE.....2

REASONS FOR NOT GRANTING THE WRIT.....11

I. THIS COURT DOES NOT HAVE JURISDICTION UNDER 28 U.S.C. §1257(3).....11

A. The Federal Claim Presented To This Court Was Neither Presented Nor Ruled Upon By The Supreme Judicial Court.....11

B. The Judgment Below Is Not A Final Judgment Under 28 U.S.C. §1257(3).....14

C. Petitioners' Request For Review Is Merely A Request For An Advisory Opinion..16

II. REVOCATION OF THE SUSPENSION OF EXECUTION OF SENTENCE DOES NOT VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY.....17

A. Rule 29, Mass. R. Crim. P. Provides For Revocation Of Sentence.....17

B. The Trial Court Did Not Increase The Sentence....20

C. Double Jeopardy Principles Do Not Necessarily Prohibit A Change In A Sentence.....22

CONCLUSION.....30

TABLE OF AUTHORITIES

Cases

Abney v. United States,
431 U.S. 651 (1977).....15

Aldoupolis v. Commonwealth,
Mass. 435 N.E.2d 330, 386
Mass. 260 (1982).....8, 9, 10

Arizona v. Washington,
434 U.S. 497, (1981).....23, 24

Berman v. United States,
302 U.S. 211 (1937).....15

Bullington v. Missouri,
541 U.S. 430 (1981).....23

Burks v. United States
437 U.S. 1 (1978).....23

Cohen v. Beneficial Loan Corp.,
337 U.S. 541 (1949).....15

Commonwealth v. Sawicki,
369 Mass. 377 (1975).....25

Commonwealth v. Sitko,
372 Mass. 305, 314 (1977).....18

Commonwealth v. Weymouth,
85 Mass. 92 Allen 114 (1961).....28

Federal Radio Comm. v. General Electric Company,
281 U.S. 464 (1930).....17

Gagnon v. Scarpelli,
411 U.S. 788 (1973).....24

Garcia v. United States,
492 F.2d 395 (10th Cir. 1974),
cert. denied, 419 U.S. 897.....19

Llerana v. United States,
508 F.2d 78 (1975).....19

Morrissey v. Brewer,
408 U.S. 471 (1972).....25

Mutual Life Ins. Co. v. Snyder,
93 U.S. 393 (1876).....17

Newsom v. Smyth,
365 U.S. 604, 605 (1961).....14

North Carolina v. Pearce,
395 U.S. 711 (1969).....22

Parr v. United States,
351 U.S. 513, 518 (1956).....15

Stroud v. United States,
251 U.S. 15 (1919).....24

United States v. Ball,
163 U.S. 662 (1896).....23

United States v. Busic,
639 F.2d 240, 948 n.11
(3rd Cir. 1981).....28

United States v. Bynoe,
562 F.2d 126 (1sr Cir. 1977)...20, 21

United States v. DiFrancesco,
449 U.S. 117, (1980)...26, 27, 28, 29

United States v. DiFrancesco,
604 F.2d 769 n.18
(2nd Cir. 1979).....27

United States v. Romero,
642 F.2d 392 (10th Cir. 1981).....19

United States v. Tateo,
377 U.S. 463 (1964).....23

Statutes

M.G.L.c. 211, §3.....7, 8

M.G.L. c. 265, §22.....3

M.G.L. c. 279, §1.....6, 8, 9

M.G.L. c. 279, §1A.....6

Mass. R. Cr. P. 12(c), 2(b).....5, 7

Mass. P. Cr. P. 12(f).....30

Mass. R. Crim. P.29..6, 9, 16, 17, 18, 20

Fed. R. Cr. P. 35.....18

28 U.S.C. §1257(3)..... 2, 11, 14

U.S. Constitution, Fifth Amendment
Double Jeopardy Clause.....22, 28

NOS. 82-203, 82-5159

IN THE SUPREME COURT
OF THE UNITED STATES

NO. 82-203

MARK S. SAVOY
and
ROBERT J. TARR,
Petitioners

V.

COMMONWEALTH OF MASSACHUSETTS
Respondent

NO. 82-5159

ALEXANDER ALDOUPOLIS,
Petitioner

V.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

BRIEF FOR RESPONDENT, COMMONWEALTH OF MASSACHUSETTS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

OPINIONS BELOW

Respondent is not dissatisfied with petitioners' citation to opinions below.

JURISDICTION

Petitioners' claim jurisdiction under 28 U.S.C. §1257(3). Respondent will question the jurisdiction of the Court.

STATEMENT OF THE CASE[1]

On October 5, 1981, the petitioners and their co-defendants offered a plea of guilty to charges of rape, unnatural rape and malicious destruction of property. In the course of examining each defendant as to the voluntariness and competency of the plea, the Court inquired of the assistant district attorney whether there was "an agreement made contingent upon the defendant's offer to change his plea ...?" The

---

1/ The Statement of the Case is based in part upon the consolidated Record Appendix submitted to the Supreme Judicial Court.

reply was in the negative, without challenge by counsel for the defendants Consolidated R.A. 108; Tr. 11, 24, 30, 38, 44). The prosecution added that its recommendation for all defendants was an M.C.I. Concord commitment of ten years. (Consolidated R.A. 118, 129, 138, 145; Tr. 11, 22, 31, 38). The Court then proceeded to instruct the defendants that it was not restricted by the sentence recommendation, that any sentence provided by law could be imposed and that the maximum penalty for rape under c. 265, section 22, is a state prison sentence for life or any term of years. (Consolidated R.A. 119, 132, 146; Tr. 12-13, 25, 32, 39). The defendants denied that any threats or promises had been made which induced them to change their plea, (Consolidated R.A. 119; 134, 139, 145: Tr. 12, 27, 31,

38, 41), and acknowledged that they were pleading guilty because they were guilty "and for no other reason." Consolidated R.A. 129, 135, 142, 149; Tr. 22, 28, 35, 42).

After hearing argument of defense counsel, the Court adopted defense counsel's request for suspended Walpole sentences of three to five years, with two years of supervisory probation (Consolidated R.A. 169; Tr. 62), and imposed as a condition of probation that defendants Tarr and Savoy obtain a G.E.D. degree during the two years of probation. (Consolidated R.A. 171; Tr. 63). The Court further imposed court costs of five hundred dollars a week for a hundred weeks commencing on October 8, 1981. On October 8, 1981, counsel for each defendant was ordered to appear before the court at 10 a.m. on October

9, 1981. (Consolidated R.A. 170, 173-180; Tr. 63, 66-73).

On October 9, 1981, the court reconvened and with defendants and counsel present, revoked the suspension of the execution of the sentences imposed on October 5, 1981 and in accordance with Mass. R. Cr. P. 12C, 2(b) gave leave to the defendants to move to withdraw their pleas of guilty. (Consolidated R.A. 186; Tr. October 9, 1981, 5).

In revoking the suspension of the execution of the three to five year Walpole state prison sentence, the Court noted that it felt that the original sentence was "an appropriate disposition under the facts and circumstances then presented to me in a lobby conference." (Consolidated R.A. 183; Tr. 2). The Court continued, "occasions inevitably

will occur where a Judge, upon receipt of other information, will feel that due weight to all factors was not taken into account on the imposition of sentencing, such as the situation presented here as regards to the suspension of the sentence imposed ..." (Consolidated R.A. 185; Tr. 4). The Court, in addition, noted the questionable validity of imposition of a suspended sentence under Gen. Laws C. 279, §§1 and 1A. (Consolidated R.A. 186; Tr. 5).

The court then issued the following order:

> It is ordered that the suspension of the execution of the sentences imposed in the above-entitled matters on October 5, 1981 is hereby revoked. (Mass. R. Crim. P. 29). The defendants shall stand committed in execution of these sentences for a term of not less than three years nor more than five years, at hard labor at our Massachusetts

> Correctional Institution, Walpole. The Court stays execution of these sentences pending further order of this court or an Appellate Court. Pursuant to the provision of the Mass. R. Crim. P. 12(c)(2)(b). The defendants are granted leave to withdraw their pleas of guilty and stand for a trial on the merits during the February criminal session. The defendants are released on their own personal recognizance pending further order of this Court. Action otherwise disposing of related companion cases is vacated those matters are returned to the trial list."

(Consolidated R.A. 190).

Shortly before October 9, 1981, certain defendants signed probation contracts and made the first payment of court costs. (Consolidated R.A. 190).a

Thereafter, defendants filed in the Single Justice Session of the Supreme Judicial Court motions to enjoin, to intervene and ultimately petitions for relief under Mass. Gen. Laws c. 211, §3. The Attorney General filed a Motion

to Intervene on behalf of the Trial Court of the Commonwealth which was unopposed and a Motion to Dismiss. The Single Justice reserved and reported three questions to the Full Bench of the Supreme Judicial Court.[2/]

2/ (1) Whether G.L. c. 279, §1, prohibits the suspension of the execution of a sentence of an offense punishable by life imprisonment or for any lesser term of years; (2) whether the trial judge was authorized under Mass. R. Crim. P. 29 to convert the suspended sentence to a sentence of imprisonment without violating the Double Jeopardy Clause of the United States Constitution; and (3) whether, if the answer to issue (2) is in the affirmative, the judge can take the action described on less than twenty-four hours' notice to the defendants, without any prior notification of the purpose the hearing, and without the defendants' having an opportunity to be heard at the hearing. Aldoupolis v. Commonwealth, 435 N.E.2d 330 (1982).

The Court held that the trial court's original suspension of the execution of sentence was not forbidden by G.L. c. 279, §1. However, the court further held that the constitutional prohibition against double jeopardy did not preclude the trial court's revision and revocation of the sentence pursuant to Mass. R. Crim. P. 29 within 60 days after imposition of that sentence "if it appears that justice may not have been done." The court further held that the defendants were given neither notice nor opportunity to be heard at the hearing wherein suspension of execution of sentence was revised and revoked, and therefore ordered "[t]he sentences are to be vacated and the defendants are to be resentenced in a manner consistent with this opinion." Aldoupolis v. Commonwealth, Mass. 435 N.E.2d 330, 386

Mass. 260 (1982). A petition for rehearing was denied on June 3, 1982.

Petitioners then sought an injunction in the federal district court to prevent a hearing on re-sentencing scheduled for July 1, 1982. On June 30, 1982, the motion for preliminary injunction was denied, after hearing.

The petitioners then applied to the Court of Appeals for the First Circuit for a stay of the District Court Order pending appeal. The Court of Appeals, without hearing, denied the stay. During these federal proceedings, petitioner also sought, ex parte, stay of the re-sentencing proceedings in the Supreme Judicial Court. The stay was denied.

On July 6, 1982, this Court (Brennan, J.) denied without prejudice petitioners' application for a stay of

the resentencing proceedings.

On July 12, 1982, petitioners Savoy and Tarr petitioned the single justice of the Supreme Judicial Court for an order allowing them to withdraw their guilty pleas. Said petition was denied.

At the resentencing hearing on July 15, 1982 the petitioners filed motions to withdraw their guilty pleas. Said motions were allowed and a trial date set for December.

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT DOES NOT HAVE JURISDICTION UNDER 28 U.S.C. §1257(3)

A. The Federal Claim Presented To This Court Was Neither Presented Nor Ruled Upon By The Supreme Judicial Court.

Petitioners Savoy and Tarr present the following question to this Court:

> "Whether the petitioners' Fifth and Fourteenth Amendment rights not to be placed twice in

> jeopardy will be violated by their trial on charges to which they have already pled guilty, been sentenced, and commenced execution of said sentences". Petition No. 82-203.[3]

Petitioner Aldoupolis frames the question as follows:

> "Is it a violation of petitioners' Fifth and Fourteenth Amendment Right not to be placed in double jeopardy to be resentenced or retried when petitioner has already pleaded guilty and commenced serving a legally imposed sentence with every expectation that it was a final disposition?" Petition of Aldoupolis, No. 82-5159, I.

The relevant question presented to and decided by the Supreme Judicial Court was whether the trial judge, on his own motion could vacate a suspended sentence and impose a jail sentence under Mass. R. Crim. P. 29. See, Petition of Savoy,

---

3/ Respondent does not concede that partial payment of court costs as a condition of probation constitutes commencement of execution of sentence.

App. A, 4a; App. H. 49a.

Thus, the case before the Supreme Judicial Court involved an interpretation of a Massachusetts rule of criminal procedure, clearly a question of state law only, and ultimately the federal issue of whether such revision of sentence or resentencing would violate the constitutional prohibition against double jeopardy. The Court ruled that it would not, if done with full due process procedural protections, and sent the case back to the trial court for resentencing. However, the petitioners were never resentenced. They withdrew their pleas of guilty and are now set for trial. The only live controversy is whether they can be tried, given the initial acceptance (and later withdrawal) of their pleas.

This issue was never presented to nor ruled upon by the Supreme Judicial Court. Therefore, the writ should not be granted. Newsom v. Smyth, 365 U.S. 604, 605 (1961) (writ of certiorari dismissed as improvidently granted where record did not establish that the state court "found or was required to find that there was presented to it the federal claim on which the case was brought here").

B. The Judgment Below Is Not A Final Judgment Under 28 U.S.C. §1257(3).

The Court below held that petitioners' sentence could be revised but that they had not been afforded notice and an opportunity to be heard. The Court therefore vacated the sentences and remanded the case to the trial court for resentencing. The

petitioners withdrew their pleas and a future trial date was set. The jurisdictional requirement of finality is not present in the instant case. The final judgment in a criminal proceeding is the sentence. Berman v. United States, 302 U.S. 211 (1937); Parr v. United States, 351 U.S. 513, 518 (1956).

Abney v. United States, 431 U.S. 651, 652-662 (1977) does not constitute an exception to the finality rule applicable to the instant case. In Abney this Court held that a pretrial denial of a motion to dismiss an indictment on double jeopardy grounds fell within the "collateral order" exception to the final judgment rule announced in Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949). Here, however, petitioners have not moved to

dismiss the indictments on double jeopardy grounds - no court in the Commonwealth has ruled on such a motion. The only issue decided was whether a judge could revise a sentence under Mass. R. Crim. P. 29. There is now no live question concerning resentencing on the guilty pleas as the pleas have been withdrawn. There is not only no final judgment, there is no judgment at all pertaining to a live controversy.

C. Petitioners' Request For Review Is Merely A Request For An Advisory Opinion

In so far as petitioners' request of the Supreme Judicial Court's decision on petitioners' sentences imposed after their pleas of guilty, any relief ordered by the Court would not apply to them, despite petitioners' protestations they did in fact move to withdraw

their pleas of guilty. The motions were allowed. Thus, they have removed the necessary, underlying, foundation for imposition of a sentence based upon a plea. Petitioners have, in effect, extinguished their claim that the double jeopardy clause precludes re-sentencing upon their pleas of guilty. Any decision on that issue would be advisory only. This court does not give such opinions. Federal Radio Comm. v. General Electric Co., 281 U.S. 464 (1930); Mutual Life Ins. Co. v. Snyder, 93 U.S. 393 (1876).

II. REVOCATION OF THE SUSPENSION OF EXECUTION OF SENTENCE DOES NOT VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY.

A. Rule 29, Mass. R. Crim. P. Provides For Revocation Of Sentence.

Rule 29 Mass. R. Crim. P. is explicit in granting to a trial judge

the power to revise and revoke, within sixty days of imposition, a sentence "if it appears that justice may not have been done." The clear meaning of the words of the Rule and dictum in Commonwealth v. Sitko, 372 Mass. 305, 314 (1977) indicate that a judge may revise upon his own motion, and revise upward under certain circumstances without violation of double jeopardy prohibitions.

Moreover, Rule 29, is drawn in part from Fed. R. Crim. P. 35 which provides, in part, "[t]the court may correct any illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." Federal case law indicates that not only may the court correct an illegal sentence, it has a duty to do so. "When a sentencing

court discovers that a sentence imposed by it did not conform to the applicable penalty statute, it has the duty to correct the sentence so as to comply with the statute even though service of the sentence first imposed has begun, and through the corrected sentence is required to be more onerous." Llerana v. United States, 508 F.2d 78 (1975). See also, United States v. Romero, 642 F.2d 392 (10 Cir. 1981). Garcia v. United States, 492 F.2d 395 (10th Cir. 1974), cert. denied, 419 U.S. 897.

While the federal rule is limited to revision where the original sentence is illegal, while in this case it was not, the crucial factor to be elicited from the cases cited above is that neither commencement of service of the sentence, nor its increase operates to implicate the prohibition against double

jeopardy. In any event construction of Rule 29 is a matter of state law as is the Court's finding that no expectation of finality was warranted in light of that rule.

B. The Trial Court Did Not Increase The Sentence.

The trial court imposed a 3-5 year sentence, and then suspended its execution. This sentence is legal, falling within the perimeters of the punishment described by statute. When the court revoked the suspension, it removed the underlying necessary condition for probation once a sentence has been imposed, but it did not increase the terms of the previously imposed sentence.

United States v. Bynoe, 562 F.2d 126 (1st Cir. 1977) is totally inapposite. In Bynoe the court suspended imposition

of sentence and placed the defendant on probation for one month. A week later the court vacated the order suspending imposition of sentence and imposed a fine, thereby increasing the penalty from one month probation to a $2,500 fine. Here, the court initially imposed a 3-5 year sentence, it made no attempt to increase it. Nothing in Bynoe indicates that this action is impermissible. If the court were to hold that revocation of suspension of execution of a sentence is an increase in sentence, it would logically follow that every revocation of probation and imposition of a previously imposed sentence would result in an increase in sentence constituting multiple punishment for double jeopardy consideration. There is no law to that effect. Here the court made no attempt

to increase the terms of the sentence, it merely altered the conditions under which that sentence must be served.

C. Double Jeopardy Principles Do Not Necessarily Prohibit A Change In A Sentence.

The constitutional protections afforded by the guarantee against double jeopardy are threefold:

> "It protects against a second prosecution for the same offense after acquittal. It protects against the second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."

North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

The protection is unequivocal where an acquittal on the facts has been reached. United States v. Ball, 163 U.S. 662 (1896). The rule is absolute because a jury verdict of acquittal is a final judgment (Arizona v. Washington, 434 U.S. 503 (1978) and accorded absolute finality. Burks v. United States, 437 U.S. 1, 16 (1978). See also, Bullington v. Missouri, 451 U.S. 430 (1981).

However, the protection is not absolute where an acquittal is not obtained. Retrial following reversal of a conviction is not barred by double jeopardy principles. United States v. Tateo, 377 U.S. 463 (1964),[4/]

4/ The exception is if reversal is based on insufficiency of evidence. Burks v. United States, supra.

nor is retrial barred after declaration of a mistrial under proper considerations. Arizona v. Washington, 434 U.S. 497, (1981).

This Court has, historically, never viewed sentencing determinations as possessing the same finality as acquittal. See Stroud v. United States, 251 U.S. 15 (1919).

The key to the application of the double jeopardy prohibition, it is submitted, is the finality which in a constitutional sense attends the prior disposition. Here, the disposition prior to revocation carried with it little finality. Execution of a 3-5 year sentence was suspended and probation imposed.

Probation involves only a "conditional liberty" Gagnon v. Scarpelli, 411 U.S. 788, 781 (1973)

(citing Morrissey v. Brewer, 408 U.S. 471 (1972). The lack of finality involved where the disposition is suspension of execution of sentence and probation is graphically illustrated in Commonwealth v. Sawicki, 369 Mass. 377 (1975). In Sawicki, the defendant was sentenced to one year imprisonment, sentence suspended, probation for one year. The stated term of probation ended on September 4, 1974. On March 13, 1975, the probation was ordered extended for two years.

The Supreme Judicial Court held that a judge had the power to extend the term of probation by an order entered after the original probationary term has expired. As with a case placed on file, execution of sentence may be brought forward at any appropriate time.

The ruling of this Court in United States v. DiFrancesco, 449 U.S. 117, (1980) holding that double jeopardy does not prohibit an increase in a validly imposed and executed sentence on a government appeal is controlling. Focusing upon the finality aspect, the court concluded that "a criminal sentence, once pronounced" was not "to be accorded constitutional finality and conclusiveness similar to that which attaches a jury verdict of acquittal." DiFrancesco at 435. Reaching this conclusion, the court upheld (in the fact of an attack based upon the constitutional prohibition against multiple punishments), a statute which permitted increase of sentence on the government's appeal.

In the instant case there can be no argument that the revised sentence is

greater than that authorized by the legislature, nor that the defendants have fully satisfied the original disposition.

Any possible constitutional basis for the proposition that the minimal compliance by defendants with the original disposition in this case precludes alteration of the conditions of their sentence is cast in substantial doubt by the facts in DiFrancesco itself. Reference to the Court of Appeals decision in that case reveals that DiFrancesco immediately began service of the sentence appealed by the government. United States v. DiFrancesco, 604 F.2d 769, 782 n.18 (2nd Cir. (1979). The rule in this Commonwealth has long been that a sentence could be corrected at any time during the same term of court.

Commonwealth v. Weymouth, 85 Mass. 92 Allen 114 (1961). Therefore, it would appear that there is no per se constitutional prohibition against revising a sentence and that mere commencement of service is irrelevant for double jeopardy purposes.

Since neither history nor policy underlying the Double Jeopardy Clause suggests that its purpose was to protect or enhance the finality of sentences, it is suggested that Massachusetts properly follows the practice of the federal courts in permitting resentencing and imposition of harsher conditions, as well as increased sentences.

In United States v. Busic, 639 F.2d 940 (3rd Cir. 1981), the Third Circuit applying DiFrancesco overruled prior decision holding that double jeopardy jurisprudence prohibited on remand for

resentencing, imposition of a harsher sentence than that initially imposed, and held that double jeopardy does not bar resentencing following appeal even on counts that were not set aside on appeal.

It is submitted that applying the rule and reasoning of DiFrancesco, the revocation of suspension of execution of sentence and imposition of the originally declared sentence, with the option to withdraw the pleas, does not offend double jeopardy principles. This conclusion obtains where revocation was made upon receipt of other information and the court felt that due weight to all factors had not been taken into account, as the trial judge indicated at the revocation hearing. (Consolidated R.A. 185).

Therefore, it is submitted that,

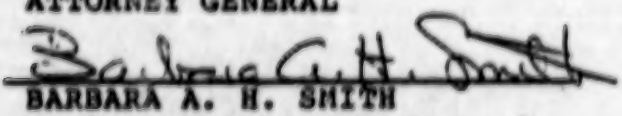
even though the issue is not properly before the Court, the constitutional prohibition against double jeopardy was not offended, and in any event the petitioners have "wiped the slate clean" by withdrawing their pleas of guilty.[5/]

CONCLUSION

For the reasons stated above, the petitions for writ of certiorari should be denied.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

BY: 

BARBARA A. H. SMITH
Assistant Attorney General
Chief, Criminal Appellate Division
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2240

5/ Mass. R. Crim. P. 12 (f) makes evidence of a withdrawn guilty plea inadmissible in any subsequent criminal or civil proceeding.